INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Constitutional and statutory provisions involved	2
Statement	2
A. The first publicity directed at petitioner	4
B. Publicity directed against petitioner during his trial and conviction in neighboring Multnomah County	4
How the Federal question was raised	7
Reasons for granting the writ	8
Conclusion	9
Appendix A—Opinion below	A1
Appendix B—Judgments below	A9
(1) Judgment of affirmance	A9
(2) Judgment denying rehearing	A10

AUTHORITIES

McDonald v. *Oregon*, pending on petition for writ of certiorari, No. 395, this Term	2, 4, 5, 6, 8
Oregon Revised Statutes, 164.830	3
Constitution of the United States, Fourteenth Amendment	2, 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No.

LEVI S. McDONALD, *Petitioner,*

v.

STATE OF OREGON

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

LEVI S. McDONALD, your petitioner, prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Oregon, entered in the above-entitled case on October 18, 1961.

OPINION BELOW

The opinion of the Supreme Court of Oregon (Appendix A, *infra,* pp. A1-A8) is reported at 73 Oregon Advance Sheets 337 and at 365 P. 2d 494.

JURISDICTION

1. The judgment of the Supreme Court of Oregon (Appendix B, *infra,* p. A9) was entered on October 18, 1961. A timely petition for rehearing was denied on November 14, 1961 (Appendix B, *infra,* p. A10).

2. The Federal question was raised as indicated at pp. 7-8, *infra.*

3. The jurisdiction of the Court is invoked under the provisions of 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Whether, where the accusation is by indictment, the repeated publication in the newspapers and in broadcasts on television of generalized statements of petitioner's guilt, as well as similar publication of statements of witnesses who implicated petitioner, which statements had been supplied by State officers, so far prevented the grand jury from acting as a fair and impartial body, when finding the indictment against petitioner, as to have denied him equal protection and due process of law.

2. Whether the denial of petitioner's timely motions for a postponement of a trial because of widespread community prejudice against him, created by adverse newspaper and television publicity that had been intensively disseminated throughout the State, commencing prior to his indictment, continuing for nearly four months thereafter, and including reports of his trial and conviction for a similar offense in the adjoining county, so far deprived him of a fair trial as to have denied him due process of law.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Constitutional provisions basically involved are the Due Process and Equal Protection Clauses of the Fourteenth Amendment, both of which are sufficiently familiar to the Court as not to require quotation.

2. This case does not turn on the terms of any Oregon statute referred to in the course of this petition.

STATEMENT

This is a companion case to *McDonald* v. *Oregon*, No. 395, this Term, now pending on petition for a writ of certiorari, involving the same individual.

In No. 395, petitioner was indicted, tried and convicted in Multnomah County, for setting off and exploding a quantity of dynamite on January 31, 1960, with intent to injure

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four trucks, the property of The Hertz Corporation, which were leased to and operated by *The Oregonian-Oregon Journal*, two newspapers there circulated together, in violation of O.R.S. 164.830, and sentenced to pay a fine of $500 and to serve an indeterminate sentence of not to exceed ten years.

In this case, petitioner was indicated, tried and convicted in Clackamas County—just south of Multnomah County, Oregon City, the former's county seat, being less than 10 miles away from Portland, the latter's county seat—for similarly setting off and exploding a quantity of dynamite on the same day, January 31, 1960, with intent to injure six trucks, the property of Eugene D. Wymore, similarly leased to and operated by the same newspapers, in violation of the same statute (R. 1).[1]

In this case, the judgment against petitioner was a sentence to confinement "for an indeterminate period not to exceed ten (10) years, and that said sentence shall run *consecutively* with the sentence heretofore imposed by the Circuit Court of Multnomah County • • • (R. 67). [Italics added.]

The first Multnomah County indictment was returned on February 13, 1960, the second on February 24; the present Clackamas County indictment was returned in the interim, on February 18 (R. 1).

The Multnomah County trial took place on May 3 to 10, inclusive, in Portland, the present trial commenced on June 20 (Tl. Tr. 3, 72), in Oregon City.

As in No. 395, no question is raised concerning any issue other than the quantum and effect of the newspaper and

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[1] The record in the present case is unprinted. "R." refers to the basic file of court papers. "Tl. Tr." refers to the typewritten volumes of the Trial Transcript, which also contain the proceedings on petitioner's motion for postponement. "Tr.," with an indication of the date, refers to the typewritten transcripts of the proceedings on the other pre-trial motions.

television publicity adverse to petitioner on (a) his indictment by grand jury and on (b) his request to postpone his trial until the effects of that publicity, plus the effects of the publicity concerning his Multnomah County trial and conviction, had been dissipated.

A. The first publicity directed at petitioner

In the interest of shortening the present document, the facts set forth at pp. 4-7 in the Petition in No. 395 are incorporated by reference.[2] The newspaper accounts there referred to are summarized and appear as exhibits to the affidavits by King (R. 5-25) and petitioner (R. 52-58) in this case.

After the date of those accounts, on February 18, 1960, petitioner was indicted in Clackamas County (R. 1); he moved to quash the indictment on the ground that the grand jurors were so influenced by the adverse publicity that they could not act as a fair and impartial jury, in violation of the Fourteenth Amendment (R. 3, ¶¶ 3, 4); and that motion was denied on March 11 (R. 27; Mar. 10 Tr., p. 48).

B. Publicity directed against petitioner during his trial and conviction in neighboring Multnomah County

Following his conviction in Multnomah County, petitioner moved, based on the Fourteenth Amendment, for a change of venue or postponement of trial (R. 50),

> " on the ground and for the reason that the defendant can not have a fair and impartial trial in Clackamas County, Oregon, or in any other county in the State of Oregon at this time nor for a period of a number of months until the publicity and public opinion against the defendant has subsided for the reason that there has been hostile publicity against the defendant with respect to the charge upon which the defendant is to be tried herein since February 11, 1960, almost continuously until the present time, and for the further

[2] A copy of that petition has been served on counsel for the respondent, together with the present document.

reason that the State of Oregon, during the month of May, 1960, caused the defendant to be tried before a jury in Multnomah County, Oregon, upon a charge arising out of the same transaction involved in this case, which trial and the sentencing of the defendant in Multnomah County, Oregon, caused great and widespread publicity which, when taken in connection with the previous publicity against the defendant, would prevent him from having a fair and impartial trial herein."[3]

This motion was supported by petitioner's affidavit (R. 52-58), which summarized newspaper articles from February 12 to June 16, 1960, inclusive; by affidavits of 23 citizens of Clackamas County expressing the opinion that petitioner could not have a fair trial there or anywhere else in Oregon "until the effects of this publicity subside" (R. 59-62); by oral testimony (Tl. Tr. 13-52) and by exhibits consisting of newspapers, photographs, film strips, and television scripts (Def. Ex. 1-24); and by a showing of the films that had previously been exhibited on television (Tl. Tr. 55).

In addition to the newspapers and television items considered in the earlier case (Pet., No. 395, pp. 10-13), the following items, subsequent in date to those just mentioned, were presented in this case:

Television scripts dealing with petitioner's Multnomah County trial in Portland, that gave full details of the testimony against him (Def. Ex. 17, 21), plus others that consistently referred to him as "accused [later "convicted"] of master-minding dynamiting of trucks that hauled for Portland's two struck daily papers" (Def. Ex. 24, Apr. 21, May 2, May 3, May 16) or as "accused of plotting the blasting of the trucks" (*id.*, May 5, 6, 9, 10). Many of these scripts gave summaries of the actual prose-

[3] Petitioner's defense of double jeopardy, pressed both at the trial (R. 41-48, 64-65) and on appeal (*infra*, pp. A2-A8), is not in issue now.

cution testimony admitted against him at the trial (*id.*, May 5, May 6, May 9).

Both newspapers (Def. Ex. 1, 3) also printed extensive excerpts from the trial testimony adduced against petitioner, the purport of which is indicated by the following headlines (R. 57-58):

"Prosecutor Opens State's Case, Notes McDonald Had Motive, Design"; "Key Bombing Witness Not Cross-Examined"; "Jury Hears Bombing Witnesses"; "McDonald Stony Faced as Accuser Tells Story of Truck Dynamiting"; "Liquid Throwing Described"; "McDonald Described as Plotter"; "Witnesses Say McDonald Plotted Many Ways to Force Strike End"; "Series of Witnesses Affirm Bomb Story"; "Bomb Case Near Jury; No Defense Witnesses"; "Bomb Trial Witnesses Take Fifth"; "Union Man Admits Aid in Blast"; "McDonald Guilty, Hears Fate Friday"; "McDonald Draws Ten Year Term for Bombing."

Shorter accounts appeared in the Clackamas County newspaper, the Oregon City *Enterprise-Courier* (Tl. Tr. 50; Def. Ex. 22).

The prosecution produced no evidence in support of its opposition to petitioner's motion for a continuance (Tl. Tr. 56; R. 63). None the less, the trial judge denied the motion (Tl. Tr. 67-69; R. 63), and the trial proceeded.

Five jurors were excused because of preconceived opinions (Tl. Tr. 79), and 27 more were examined (Tl. Tr. 81-228) before a jury could be empaneled.

The trial itself took three full days thereafter, and resulted, as has been noted, in a conviction (Tl. Tr. 884-885; R. 66), in which a consecutive sentence of up to 10 years was imposed (Tl. Tr. 893; R. 67).

On appeal, so far as here material, the Supreme Court of Oregon affirmed (R. 75), referring simply to the reasons set forth in its earlier opinion, 361 P. 2d 1001, now pending on petition for writ of certiorari, No. 395, this Term (*infra*, pp. A1-A2). A timely petition for rehearing was denied (R. 74).

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HOW THE FEDERAL QUESTION WAS RAISED

1. *Grand Jury Point.* (a) Par. 4 of petitioner's motion to quash the indictment (R. 3), summarized at p. 4, *supra,* invoked the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States. This motion was denied (R. 27).

(b) That denial was the subject-matter of petitioner's Seventh Assignment of Error in the Supreme Court of Oregon, which duly invoked the Fourteenth Amendment (p. 116 of item 58 in petitioner's praecipe, and transmitted here, see R. 87).

(c) The opinion of the Supreme Court of Oregon (*infra,* pp. A1-A2) considered and denied the foregoing Federal claim, on the authority of its decision on petitioner's other appeal.

(d) Petitioner renewed this contention at pp. 51-57 of his Petition for Rehearing (item 62 in petitioner's praecipe, and transmitted here, see R. 87).

(e) The petition for rehearing was denied (R. 74), rendering the conviction final.

2. *Failure to grant continuance.* (a) Petitioner's motion for a continuance (R. 50), the operative portions of which has already been quoted, *supra,* pp. 4-5, invoked the Fourteenth Amendment. This motion was also denied (R. 63).

(b) That denial was the subject-matter of petitioner's Eighth Assignment of Error in the Supreme Court of Oregon, which duly invoked the Fourteenth Amendment (p. 139 of item 58 in petitioner's praecipe, and transmitted here, see R. 87).

(c) The opinion of the Supreme Court of Oregon (*infra,* pp. A1-A2) considered and denied the foregoing Federal claim, on the authority of its decision on petitioner's other appeal.

(d) Petitioner renewed this contention at pp. 57-68 of his Petition for Rehearing (item 62 in petitioner's praecipe, and transmitted here, see R. 87).

(e) The petition for rehearing was denied (R. 74), rendering the conviction final.

REASONS FOR GRANTING THE WRIT

The same reasons for granting certiorari that were presented in respect of petitioner's Multnomah County conviction in No. 395, to which the Court is respectfully referred, and which at this juncture are incorporated by reference to avoid repetition, are applicable to and require review of this case also—but with one significant difference, which makes the present case an even stronger one:

There the newspaper and television publicity implicated petitioner in advance of a trial at which both sides could be heard; here the actual trial testimony also was brought to the attention of the public just as if every reader of the papers and every viewer at the television screen had actually been in court, listening to the evidence and witnessing petitioner's conviction. Thus the details of the testimony on which the Clackamas County prosecution would rely were common knowledge, while the television newscasters, with the cumulative impact of a refrain, were referring to this petitioner as "master-minding" and "plotting" the bombing of the trucks (*supra*, pp. 5-6).

Consequently, by the time his Clackamas County trial began, he had been twice pre-tried in the press and on television—once before his Multnomah County trial, and once during that trial.

Petitioner was held not to have been in double jeopardy, inasmuch as he was here convicted of damaging different trucks on the other side of a county line. But the evidence in both cases, which was substantially identical, showed that both cases arose out of a single expedition on a single night. The newspapers and the television stations did not sep-

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arate the two offenses, and the public could not. Indeed, so far as the impact on Clackamas County was concerned, that community was as thoroughly informed on what had gone on in the Multnomah County courthouse, a bare ten miles away, as if all had actually been present there throughout.

Petitioner's Clackamas County indictment had been thoroughly pretried in every Multnomah County news medium long before it started—with the assistance, be it noted, of the local Clackamas County newspaper as well (Tl. Tr. 50; Def. Ex. 22). Petitioner should therefore have been granted a continuance as prayed, "until the publicity and public opinion against this defendant has subsided" (R. 50). Since, however, that relief was denied him, the resultant conviction, pursuant to which a consecutive sentence of up to ten years' additional confinement was imposed, deprives him of due process of law, in violation of the Constitution of the United States.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted.

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FEBRUARY 1962.